91-1519

Supreme Court, U.S.
MAR 17 1992

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VINCENT F. COSTELLO,

Petitioner,

vs.

THOMAS A. McENERY, in his official and individual capacities; LUCIUS J. RICCIO, in his official capacity as Commissioner of the Department of Transportation of the City of New York; THE PARKING VIOLATIONS BUREAU OF THE CITY OF NEW YORK; THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK; and THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government deprives an employee of First Amendment rights pending trial by transferring and demoting him in retaliation for whistleblowing and thereafter refusing to assign him work where the government does not by these actions prevent the employee from continuing to speak out.

2. Whether a government employee who is transferred and demoted for whistleblowing may assert the deprivation of the First Amendment rights of nonparty government employees pending trial as the irreparable harm necessary to support a preliminary injunction ordering his reinstatement and prohibiting the continued punishment.

THE PARTIES

The parties before this Court are those set forth in the caption.

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No. ___

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

VINCENT F. COSTELLO, Petitioner,

vs.

THOMAS A. MCENERY, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Vincent F. Costello respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reprinted in the Appendix herein. (Appendix hereto at

A-1 to A-7)("A-1 to A-7"). The District Court's opinion is reported at 767 F. Supp. 72 and is reprinted in the Appendix herein. (A-8 to A-36).

JURISDICTION

The opinion and order of the Court of Appeals for the Second Circuit was entered on October 22, 1991. A timely petition for rehearing and rehearing en banc was denied on December 19, 1991, and this petition for certiorari was filed within ninety days of that date. The order denying rehearing is reprinted in the Appendix herein. (A-37 to A-38).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution involved in this case are the First Amendment and the

Due Process Clause of the Fourteenth Amendment. The pertinent federal statute is 42 U.S.C. § 1983. The pertinent municipal administrative code provision is N.Y. Admin. Code § 12-112, which is New York City's law on whistleblowing. These constitutional and statutory provisions are reprinted in the Appendix. (A-39 to A-43).

STATEMENT OF THE CASE

This action was brought by Petitioner Vincent F. Costello ("Costello" or "Petitioner") pursuant to 42 U.S.C. § 1983 and various state claims after, in retaliation for his whistleblowing, he was transferred from his position as Director of Operations at the Parking Violations Bureau of the City of New York ("PVB") to a "deadend" "do-nothing" position in another division of the same department.

This petition seeks review of a judgment affirming a District Court order denying Costello's motion for a preliminary injunction, inter alia, reinstating him to his former position.

Concise Facts

From June 1980 through June 1990, Costello worked as PVB's Director of Operations where he managed 160 employees who processed parking summonses and attempted to resolve complaints from the public regarding those summonses. Throughout his career, Costello has received outstanding performance evaluations from all of his supervisors, including from Defendant Thomas A. McEnery ("McEnery") -- the Director of PVB (its highest ranking official) and Assistant Commissioner of the New York City Department of Transportation ("DOT").

In early 1988, as part of his perceived job responsibilities, Costello began voicing to his superiors and others within PVB criticisms of unethical and illegal PVB policies and operating methods. For example, Costello objected to PVB's refusal to notify citizens of overpayments of fines and interest, or to refund such overpayments; to PVB's false threats of draconian debt collection actions against parking violators with small outstanding judgments; and to PVB's intentionally programming its computer to increase revenue by entering judgments on parking summonses when PVB could not establish a parking violation.

On May 14, 1990, Costello and McEnery attended a dinner at which the Association of Administrative Law Judges of PVB honored Costello with their award

for "Administrator of the Year." In his acceptance speech, Costello for the first time publicly expressed some of his prior criticisms of PVB.

Ten days later, in retaliation for Costello's repeated criticism of PVB's policies and practices which he now expressed publicly, McEnery abruptly informed Costello that he was to be reassigned to the "job" of Director of Quality Control at PVB, a position of lower rank and responsibility. McEnery also refused to describe the duties and staff to be assigned to Costello in this new "job," which previously did not exist and which remained unfilled for more than a year after McEnery offered it to Costello. After Costello declined to accept the Quality Control "job," McEnery nevertheless removed Costello from his position as

Director of Operations, and shortly thereafter Costello was assigned to DOT's Legal Affairs Division.

Costello's duties at the Legal Affairs Division were not at that time or at any other time defined and Costello's sporadic assignments have been of a menial nature, such as moving boxes. Costello continues to be paid as a high level civil service manager, but, despite Costello's repeated requests, Respondents have refused to assign him any managerial functions.*

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* After Costello instituted this action, the Respondents offered him an opportunity to "interview" for two jobs of lower managerial rank and less responsibility than his previous job. At no time, however, have Respondents actually offered or assigned Costello any position other than the one he actually occupies and at no time have Respondents offered Costello any position of similar managerial rank or authority as he previously held.

In an investigation initiated by the New York City Council President, the Respondent City of New York through its Department of Investigation ("DOI") admitted that this transfer was an "adverse personnel action" as provided in N.Y. Admin. Code § 12-113(f) (reprinted herein at A-40 to A-43).* Moreover in responding to Petitioner's motion for a preliminary injunction, Respondents have effectively

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* Respondents used the pendency of the DOI investigation as a means of delaying any consideration of reinstating Costello. Indeed, the Department of Personnel and the Mayor's office specifically refused to take any action because of the pendency of the DOI investigation. Although the DOI is required to issue its report "without undue delay," N.Y. City Admin. Code § 12-113(d), and City officials repeatedly assured Costello that his claim would be resolved promptly, the investigation lingered for almost twelve months -- in which time Costello finally filed this action -- and decision was not rendered until approximately the same date the Respondents filed their response to Costello's motion for preliminary injunction.

admitted that Costello's speech and manner of speech at executive staff meetings was a substantial motivating factor behind McEnery's decision to remove Costello from his job, but that they were justified for removing him because Costello's speech allegedly disrupted the PVB. Respondents have, however, presented no objective evidence demonstrating any decline in PVB's efficiency due to Costello's speech or why they waited over two years after Costello began speaking out to use this alleged disruption as a basis for removing Costello from his job.*

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* Although the DOI opined that Costello's reports did not concern "corruption, criminality, conflict of interest, gross mismanagement or abuse of authority," that somewhat strange determination does not rule out the reports as concerning illegal or immoral conduct and, in any event, is not binding here. Moreover, although the DOI determined that Costello was not reassigned because of "whistleblowing" activities, its definition of whistleblowing was limited to reports made

(Footnote continued)

On May 22, 1991, Costello sued Petitioners in the instant case, which is still pending in the United States District Court for the Southern District of New York, stating claims under 42 U.S.C. § 1983 and various state claims. Costello simultaneously filed a motion for a preliminary injunction seeking, among other things, an order requiring his interim reinstatement to his job as Director of Operations at PVB and thereby, pending trial, to restore the status quo prior to Respondents' deprivation of Petitioner's employment in violation of the First

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(Footnote * continued from previous page)
to certain defined persons, such as the Commissioner of Investigation, and in any case the DOI made no findings as to whether Costello's exercise of his First Amendment right to speak about issues of public concern was what motivated McEnery to take action against Costello.

Amendment; and an order prohibiting Respondents from continuing to punish Petitioner for his whistleblowing by refusing to assign him work commensurate with his managerial rank.

The District Court Opinion

After an evidentiary hearing and extensive briefing, the District Court denied Costello's motion for a preliminary injunction. The District Court accepted Costello's evidence of a retaliatory transfer and continuing punishment as true. The District Court, nonetheless, held that because Costello did not assert that he was prevented from speaking after the transfer, he suffered no ongoing deprivation of First Amendment rights. 767 F. Supp. at 77. (A-29 to A-30).

The District Court further held that any chilling of the First Amendment

rights of other PVB employees would not be cured by a preliminary injunction. 767 F. Supp. at 77. (A-30). Based on this narrow view of the requirements of the First Amendment, the District Court also found Elrod v. Burns, 427 U.S. 347 (1976), inapplicable. 767 F. Supp. at 78 n.9. (A-32n.9).

The Court of Appeals Decision

Like the District Court, the Court of Appeals also accepted Costello's assertion of a retaliatory transfer and continued punishment to be true, but still affirmed the District Court's denial of Costello's motion for a preliminary injunction. While recognizing that "[i]nterference with First Amendment rights may constitute irreparable harm," the Court found that "Costello's transfer had no such effect." (A-4). Because Costello

was not prevented from speaking after his transfer, the Court of Appeals also held that Respondents have "not infringed [Costello's] First Amendment rights since the transfer." (A-4).

Agreeing with the District Court, the Court of Appeals further found that Elrod v. Burns did not apply because "Costello has not altered his speech to retain his position." (A-4). With respect to the chilling effect on other PVB employees, the Court of Appeals agreed with the District Court that a preliminary injunction would not alleviate this chilling effect. (A-4 to A-5).

Costello timely petitioned the Court of Appeals for rehearing and rehearing en banc. On December 19, 1991, the Court of Appeals denied Costello's petition without opinion. (A-37 to A-38).

REASONS FOR GRANTING THE PETITION

I. The Decision of the Second Circuit Creates a Direct Conflict With the Decisions of Other Circuits and Contradicts Decisions of This Court That Hold That A Retaliatory Transfer, Even Absent Proof of Chilling Effect, Establishes Continuing First Amendment Harm

A. The Decision of the Second Circuit is in Direct Conflict With the Decisions of Other Circuit Courts of Appeals

The Second Circuit is the only circuit to hold that the government's discharge or transfer of an employee in retaliation for the employee's protected speech does not deprive the employee of First Amendment rights pending trial unless accompanied by some additional First Amendment injury such as a chilling of the employee's speech. Indeed, in a clear break with the Second Circuit, the First, Fourth, Sixth and Seventh Circuits have held that a retaliatory discharge or

transfer that violates the First Amendment, without more, establishes the continuing irreparable harm needed to support a preliminary injunction reinstating the employee to his position pending trial. See Newsom v. Norris, 888 F.2d 371 (6th Cir. 1989); Romero Feliciano v. Torres Gaztambide, 836 F.2d 1, 4 (1st Cir. 1987); Perry v. Local Lodge 2569, 708 F.2d 1258, 1262 (7th Cir. 1983); Johnson v. Bergland, 586 F.2d 993 (4th Cir. 1978).

For example, in Newsom v. Norris, certain inmates in a state penitentiary were employed by the state as advisors to inmates defending themselves before the prison disciplinary board. 888 F.2d at 372 n.1. In retaliation for their written and oral complaints about the performance of the chairman of the disciplinary board, the warden refused to reap-

point the advisors to an additional six-month term. Id. at 372-73. The Sixth Circuit held that the warden continued to deprive the advisors of First Amendment rights pending trial solely by his previous refusal to reappoint them:

> The majority of federal circuit courts, however, have concluded that an individual, who has been subjected to direct and intentional retaliation for having exercised the protected constitutional right of expression, continues to suffer irreparable injury even after termination of some tangible benefit such as employment.

Id. at 378 (emphasis added).

The court specifically rejected the rationale adopted by the Second Circuit in this case, that some additional evidence of chilling effect after the unlawful employment action had to be proven to establish irreparable injury:

> One reason for such stringent protection of First Amendment rights certainly is the intangible nature or the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future. . . . This does not mean, however, that only if a plaintiff can prove actual, current chill can he prove irreparable injury. On the contrary, direct retaliation by the state for having exercised first Amendment freedoms in the past is particularly proscribed by the First Amendment.

Id. at 378-79 (quoting Cate v. Oldham, 707 F.2d 1176, 1188-89 (11th Cir. 1983))(citations omitted and emphasis added).

To the same effect is the First Circuit's decision in Romero Feliciano v. Torres Gaztambide. In that case a government official obtained a preliminary injunction ordering his reinstatement after he was demoted for his political party affiliation. 836 F.2d at 2 & 4. The

court explained that "[t]he harm Romero would suffer is not only, as the Secretary argues, the loss of his job per se, but also the penalty for exercising his associational rights." Id. at 4.

In Perry v. Local Lodge 2569, plaintiff sued a municipality and a union, challenging her termination for her failure to pay the agency fees to a union as required by a collective bargaining agreement. 708 F.2d at 1259. The Seventh Circuit held that plaintiff had established a likelihood of succeeding on her claim that the agency fee was a forced subsidization of political activities which violated the First Amendment. Id. at 1262. The Seventh Circuit, therefore, affirmed the district court's order pre-

liminarily mandating the employee's reinstatement.*

In Johnson v. Bergland, plaintiff sued the federal government for removing him from his position and transferring him to a "specially-created post." 586 F.2d at 994. The Fourth Circuit held that because plaintiff established that the transfer occurred for political reasons, he had established an infringement

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* Other decisions from the Seventh Circuit are to the same effect. See Burns v. Elrod, 509 F.2d 1133, 1136 (7th Cir. 1975) (district court ordered to grant employees' motion for a preliminary injunction requesting reinstatement), aff'd, 427 U.S. 347 (1976); Kuhlmann v. Bloomfield Township, 521 F. Supp. 1242, 1244-45 (E.D. Wis. 1981) (reinstating chief of police discharged by town board because of his declaration of support during election for candidate challenging incumbent member of board); Vincent v. Maeras, 447 F. Supp. 775, 779 (S.D. Ill. 1978) (reinstating employee of sheriff's department discharged because he declared candidacy for office of sheriff).

of his First Amendment rights and, therefore, irreparable harm. Id. at 995.

Unlike the Second Circuit's decision in this case, the First, Fourth, Sixth and Seventh Circuits would not have required Petitioner to demonstrate that he suffered any First Amendment injury to support his preliminary injunction motion other than the retaliatory employment action. Accordingly, public employees in Chicago, Boston, Richmond and Cincinnati have greater First Amendment protection than Petitioner has in New York.

This Court cannot allow such disparate treatment to continue. First Amendment rights must be accorded uniform protection.

B. The Decision of the Second Circuit Conflicts With Elrod v. Burns, 427 U.S. 347 (1976), and Rutan v. Republican Party, 110 S. Ct. 2729 (1990)

In Elrod v. Burns, 427 U.S. 347 (1976), this Court held that three plaintiffs who had been discharged for refusing to change their political affiliations, as well as one plaintiff whose discharge was threatened, established First Amendment violations. Id. at 374-75. The Court further held that these First Amendment violations established irreparable harm, and thus affirmed the Seventh Circuit's judgment granting these employees' motion for a preliminary injunction:

> It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.

427 U.S. at 373 (emphasis added). In Rutan v. Republican Party, 110 S. Ct. 2729 (1990), this Court extended Elrod to apply not only to unlawfully motivated discharges but to promotions, transfers and recalls after layoffs based on the exercise of First Amendment rights.*

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* Rutan arose in the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), 110 S. Ct. at 2732 n.1, and, therefore, did not comment on Elrod's irreparable harm standard. Nonetheless, because a transfer and demotion deprive an employee of First Amendment rights, under the irreparable harm standard of Elrod, such a transfer and demotion must likewise cause the employee irreparable harm.

The Second Circuit erroneously found Elrod inapplicable to this case because "Costello has not altered his speech to retain his position." (A-4). The Second Circuit thus disregarded the fact that the preliminary injunction in Elrod was based on retaliatory discharges and not on any further injury to the plaintiffs' First Amendment rights after the discharges. Nothing in Elrod suggests that the plaintiffs suffered any additional injuries cognizable under the First Amendment by, for example, changing their political parties.

The Second Circuit also disregarded Rutan by holding that "[i]nterference with First Amendment rights may constitute irreparable harm, but Costello's transfer had no such effect." (A-4). In Rutan, this Court rejected the argument

that a transfer cannot by itself deprive an employee of First Amendment rights. The Court stated that the government deprives an employee of First Amendment rights even where the government's decision to transfer the employee does not "chill the exercise of protected belief and association." 110 S. Ct. at 2736. In this regard the Court explained:

> Employees who find themselves in deadend positions due to their political backgrounds are adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder.

110 S. Ct. at 2736 (first emphasis in original; second emphasis added).

The Rutan Court thus recognized that retaliatory punishment will always be accompanied by an impermissible incentive

not to speak, and that such incentive is inconsistent with the First Amendment. By contrast, the Second Circuit's decision focuses on the effect of the government coercion rather than the punishment and inherent coercion that constitutes the First Amendment violation and establishes irreparable injury.*

In light of the apparent disregard of Elrod and Rutan by the Court be-

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* The Second Circuit also erroneously approved of dictum of the District Court that Petitioner's alleged "delay in seeking relief bolsters the Court's conclusion that there has been an insufficient showing of irreparable harm to justify issuance of a preliminary injunction." 767 F. Supp. at 78. (A-35). As set forth herein, Petitioner has made a more than adequate showing of irreparable harm. At the very least, the Court should remand with instructions for the Court of Appeals to take into account the irreparable harm flowing from the retaliatory punishment and, with regard to the reasonableness of the Petitioner's delay, take into account the delay in the DOI's completion of its investigation, which delay Petitioner maintains is part and parcel of the retaliatory punishment of which he complains.

low, both a grant of certiorari and summary reversal are appropriate.* See, e.g., Cardwell v. Taylor, 461 U.S. 571 (1983) (per curiam); Immigration and Naturalization Service v. Miranda, 459 U.S. 14 (1982) (per curiam).

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* The Second Circuit thus erred in applying Sampson v. Murray, 415 U.S. 61 (1974), and holding that "loss of employment does not constitute irreparable injury." (A-3 to A-5). Unlike here, Sampson involved an alleged injury the employee's reputation and a loss of income, having nothing to do with the assertion of a First Amendment right. Federal courts have likewise found Sampson distinguishable on this basis. See Shondel v. McDermott, 775 F.2d 859, 866-67 (7th Cir. 1985); Goodwin v. LaPolla, 589 F. Supp. 1423, 1430 (N.D.N.Y. 1984); Perry v. City of Fort Wayne, 542 F. Supp. 268, 274 (N.D. Ind. 1982).

II. The Second Circuit Disregarded Controlling Supreme Court Authority in Refusing to Consider the Deprivation of the First Amendment Rights of Other PVB Employees As Support For Petitioner's Motion For a Preliminary Injunction

The Second Circuit refused even to consider the First Amendment injuries of other PVB employees in determining whether Petitioner established irreparable injury to support his motion for a preliminary injunction or require the District Court to resolve the factual question of whether and what kind of interim relief would alleviate those injuries.* Under

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* To be sure, the Second Circuit acknowledged that the District Court failed to consider Costello's evidence that his transfer and demotion chilled the exercise of First Amendment rights of other PVB employees. (A-5). The Second Circuit nonetheless found that the District Court's failure to consider this evidence "did not constitute an abuse of discretion" (A-5), and that as a matter of law "[b]ecause the permanent transfer is the source of the purported chill, preliminarily returning him to his job pending resolution of the case would not abate that effect." (A-4 to A-5).

the decisions of this Court, however, a party asserting a First Amendment right may rely on the First Amendment rights of third parties.

For example, in Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383 (1987), this Court specifically found that organizations of booksellers and bookstores had standing to assert the First Amendment rights of nonparty book-buyers in challenging the constitutionality of a statute regulating the sale of books. Id. at 392-93. Similarly in Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1962), this Court found that book publishers had standing to assert the First Amendment rights of book distributors and retailers in challenging the constitutionality of a statute regulating distribution

and sale of books deemed objectionable by a state commission. Id. at 64-65 n.6.

The Second Circuit's refusal to order the District Court to resolve whether interim relief would as a factual question alleviate the First Amendment injuries to other PVB employees, effectively denied Petitioner the right to assert those rights. This error mandates either summary reversal of the Second Circuit's decision in this case or full review by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
March 18, 1992

Respectfully Submitted,

/s/

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of October , one thousand nine hundred and ninety-one.

Present:

Honorable William H. Timbers,
Honorable Ralph K. Winter,
Honorable John M. Walker,
Circuit Judges.

----------x

VINCENT F. COSTELLO,

Plaintiff-Appellant,

v.

THOMAS A. MCENERY, in his official and individual capacities; LUCIUS J. RICCIO, in his official capacity as Commissioner of the Department of Transportation of the City of New York; THE PARKING VIOLATIONS BUREAU OF THE CITY OF NEW YORK; THE DEPARTMENT OF TRANSPORTATION OF

ORDER

#91-7741

THE CITY OF NEW YORK;
and THE CITY OF NEW :
YORK,
:
Defendants-Appellees.
:
----------x

Appeal from the United States District Court of the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Vincent F. Costello appeals from Judge Leisure's order that denied his motion for a preliminary injunction restoring him to his original position pending determination of the underlying action.

To obtain a preliminary injunction, Costello must show (1) irreparable harm and (2) either (a) likelihood of

success on the merits or (b) sufficiently serious questions going to the merits that make them fair ground for litigation and a balance of the hardships that tip decidedly in his favor. Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676, 679 (2d Cir. 1988). We may review the district court's application of these principles only to redress an abuse of discretion. See Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577, 581 (2d Cir. 1989).

Costello claims that the defendants transferred him to a new position in retaliation for the exercise of his First Amendment rights, and that this interference with his First Amendment rights by itself establishes irreparable injury. As a preliminary matter, loss of employment does not constitute irreparable injury.

Sampson v. Murray, 415 U.S. 61, 91-92 (1974). Interference with First Amendment rights may constitute irreparable harm, but Costello's transfer had no such effect. Costello has not altered his speech to retain his position, and Elrod v. Burns, 427 U.S. 347 (1976), is not applicable. Costello also concedes that his employer has not infringed his First Amendment rights since the transfer. Reinstatement with back pay without injunctive relief can thus compensate Costello. Savage v. Gorski, 850 F.2d 64, 68 (2d Cir. 1988); American Postal Workers Union v. United States Postal Service, 766 F.2d 715 (2d Cir. 1985), cert. denied, 475 U.S. 1046 (1986).

Costello claims that a chilling effect on his fellow employees' speech persists. Because the permanent transfer

is the source of the purported chill, preliminarily returning him to his job pending resolution of the case would not abate that effect. Savage, 850 F.2d at 67-68; American Postal Workers, 766 F.2d at 722. The district court's failure to consider Costello's chilling effect evidence thus did not constitute an abuse of discretion.

Costello argues that the damage to his reputation or self-esteem resulting from the menial tasks involved in his new position are a continuing punishment for the exercise of his First Amendment rights. However, Sampson held that irreparable harm, except in extraordinary circumstances, cannot result from financial distress, reputational damage, or similar negative effects of termination. 415 U.S. at 90-92.

The district court also did not abuse its discretion by taking into account Costello's delay for almost a year in seeking an interim injunction. Delay certainly suggests a reduced need for a drastic measure like a preliminary injunction. Costello's invocation of the exhaustion requirement does not excuse his delay. The relevant exhaustion statute does not limit the rights of employees to seek administrative or judicial review of personnel decisions. In fact, Costello commenced the present action prior to the completion of an internal investigation into the matter.

/s/
Hon. William H. Timbers, U.S.C.J.

/s/
Hon. Ralph K. Winter, U.S.C.J.

/s/
Hon. John M. Walker, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VINCENT F. COSTELLO, Plaintiff, -against- THOMAS A. MCENERY, in his official and individual capacities; LUCIUS J. RICCIO, in his official capacity as Commissioner of the Department of Transportation of the City of New York; THE PARKING VIOLATIONS BUREAU OF THE CITY OF NEW YORK; THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK; and THE CITY OF NEW YORK, Defendants.	ORDER AND OPINION No. 91 Civ. 3475 (PKL)

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Attorneys for Defendants

LEISURE, District Judge:

This is an action brought pursuant to 42 U.S.C. § 1983 asserting, in essence, that plaintiff was transferred from one job to another in retaliation for public and private comments plaintiff made regarding purportedly unethical and illegal practices at the New York City Parking Violations Bureau. Plaintiff claims that his rights under the first amendment of the United States Constitution have thereby been violated. Plaintiff has now moved for a preliminary injunction, seeking the following interim relief:[1]

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[1] Plaintiff did not seek a temporary restraining order before moving for a preliminary injunction.

1) reinstatement of plaintiff to his former position as Director of Operations at the Parking Violations Bureau;

2) discontinuance of adverse personnel actions against plaintiff, including refusing or failing to assign plaintiff job duties commensurate with his seniority and managerial rank;

3) continued payment to plaintiff of his present salary, and maintenance of plaintiff's present managerial rank, and

4) a bar on defendants' reporting adverse personnel actions to any potential future employer of plaintiff.

For the reasons set forth below, plaintiff's motion for a preliminary injunction is denied.[2]

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[2] This Order and Opinion shall constitute the Court's findings of facts and conclusions of law, as required by Fed. R. Civ. P. 52(a) and 65(d). These findings are based solely on the evidence now before the Court, and are only controlling with respect to decision of the instant motion.

Background

Plaintiff Vincent F. Costello was employed by the City of New York as Director of the Operations Division of the Parking Violations bureau ("PVB"), beginning in June 1980. The function of the Operations Division of the PVB is to process parking violations summonses, including, inter alia, the resolution of public inquiries and complaints, the correction of electronic and manual files, and the processing of refund claims. Plaintiff was responsible for management of the Operations Division.

Defendant Thomas A. McEnery ("McEnery") was at all relevant times Deputy Commissioner of the New York City Department of Transportation ("DOT"), and Director of the PVB, a bureau of DOT. Defendant Lucius J. Riccio was at all

relevant times Commissioner of DOT. The remaining defendants are the PVB, DOT, and the City of New York.

In early 1988, plaintiff began voicing numerous criticisms of what he claimed to be unethical or illegal PVB policies and operating methods. Specifically, plaintiff objected to: The reprogramming of the PVB computer in such a manner as to cause the computer inaccurately to record parking violations; PVB's failure to make a warranty claim with respect to the inadequate performance of a computer PVB had purchased; PVB's failure to notify citizens of overpayments of fines and interest, and to refund such overpayments; certain improper practices involving city marshals' collection of judgments; PVB's "false threats" of debt collection actions against parking viola-

tors with small outstanding judgments; PVB's instructions to administrative law judges to find persons guilty of parking violations in cases in which the PVB could not establish a prima facie case; and PVB's use of an inadequate number of private collection agencies. These criticisms were addressed to defendant McEnery, as well as to others within the PVB, from early 1988 through April 1990.

On May 14, 1990, plaintiff and McEnery attended a dinner given by the association of PVB's administrative law judges, at which plaintiff was presented with an award as "Administrator of the Year." In his acceptance speech, plaintiff restated some of his prior criticisms of PVB policies and practices. At a meeting on May 24, 1991, McEnery informed plaintiff that he was transferring plain-

tiff to the recently-created position of Director of Quality Control and Project Implementation, and that plaintiff would remain at the same level of seniority and salary. Plaintiff refused to accept the new position.

Defendants claim that plaintiff was transferred because he was disruptive and had difficulties cooperating with his peers and supervisors, had become rigid and isolated as Director of the Operations Division, and because McEnery believes that managers tend to become "stale" if they remain in one job for too long. McEnery also asserts that the new position had been created prior to plaintiff's May 14 speech, and that his transfer of plaintiff was in no way in retaliation for the criticisms of the PVB plaintiff made either in that speech or prior thereto.

Plaintiff, in contrast, claims that McEnery refused -- and continues to refuse -- to describe plaintiff's new responsibilities, or the size of his staff. He also asserts that McEnery's stated reasons for the transfer are merely pretextual, and that McEnery's true reason for removing him from the position of Director of Operations was to retaliate against plaintiff for his criticisms of the PVB. Finally, plaintiff claims that no PVB manager has been removed in the past ten years merely for the sake of change.

On May 25, 1991, McEnery asked plaintiff to reconsider his refusal to accept the new position, and informed plaintiff that he would remove plaintiff from his existing position regardless of whether plaintiff took the new position.

Plaintiff did not accept the new position, and, effective June 1, 1990, he was removed from the Director of Operations position, and shortly thereafter assigned to DOT's Legal Affairs Division at the same level of pay. Plaintiff claims that his duties in the Legal Affairs Division have been generally undefined, and that to the extent he has done work it has been of a menial nature. McEnery, however, states that the assignment to Legal Affairs Division was meant to be temporary until another position could be located, that plaintiff has been encouraged to apply for several other managerial positions, and that plaintiff has refused to consider any

of them.[3] Plaintiff disputes this, asserting that he has merely requested more information regarding the positions.

On or about May 30, 1990, plaintiff reported his transfer to New York City Council President Andrew Stein. By letter dated June 26, 1990, Mr. Stein requested that the New York City Department of Investigation ("DOI") conduct an investigation of the transfer to determine whether it violated the so-called "whistleblower" law, Local Law of the City of New York 1984, No. 10. DOI thereafter carried out a lengthy investigation of

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[3] The New York City Department of Personnel ("DOP"), in response to a letter from plaintiff's counsel, conducted an investigation of plaintiff's reassignment. In September 1990, DOP concluded that because plaintiff's transfer was a lateral managerial move, the reassignment could not be viewed as a disciplinary action.

plaintiff's transfer, and, on June 11, 1991, issued a thorough report, finding that plaintiff was reassigned not because of "whistleblowing" activities, but because he could no longer work constructively with PVB management.

Plaintiff commenced this § 1983 action on May 22, 1991, nearly one year after his transfer, and shortly thereafter moved for preliminary injunctive relief. Plaintiff claims that his transfer was in fact in retaliation for his speaking out on matters of public concern; and thus defendants have violated, and continue to violate, his rights under the first amendment. In addition, plaintiff claims that by reassigning him, defendants have damaged his honor, integrity and reputation, and caused him pain and suffering. Finally, plaintiff asserts that other PVB em-

ployees have informed him that they are now fearful of reporting any unethical or illegal conduct at PVB because they believe PVB officials will retaliate against them. Plaintiff thus seeks injunctive relief on the additional ground that the first amendment rights of those other PVB employees are also being infringed.[4] On July 11, 1991, an evidentiary hearing was held on plaintiff's motion for a prelimi-

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[4] In support of this final claim, plaintiff's counsel has provided a declaration purporting to summarize affidavits of eight other PVB employees -- none of whom is a plaintiff in this action -- who allegedly fall into this category. According to the declaration, the affiants do not want their identities revealed, for fear of retaliation. However, the alleged chilling effect on persons who are neither plaintiffs in the instant case nor represented in any way by the person who is the plaintiff, has tenuous relevance at best to plaintiff's motion. Moreover, even if the facts contained in plaintiff's counsel's declaration are assumed to be true, they would not support granting the injunctive relief plaintiff seeks, for the reasons stated herein.

nary injunction. That motion is now before the Court.

Discussion

"[A] preliminary injunction is an extraordinary remedy that should not be granted as a routine matter." JSG Trading Corp. v. Tray-Wrap, Inc. 917 F.2d 75, 80 (2d Cir. 1990); see also Patton v. Dole, 806 F.2d 24, 28 (2d Cir. 1986). "A party seeking a preliminary injunction must demonstrate that it is likely to suffer possible irreparable harm if the requested relief is not granted and 'either (1) a likelihood of success on the merits of its case or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor.'" Citibank, N.A. v. Nyland (CF8) Ltd., 839 F.2d 93, 97 (2d Cir. 1988)

(quoting Coca-Cola Co. v. Tropicana Products, Inc., 690 F.2d 312, 314-15 (2d Cir. 1982)). Indeed, where, as here, the relief sought is in part mandatory, and not merely prohibitive, a "substantial" likelihood of success on the merits has been required. See Securities and Exchange Commission v. Unifund SAL, 910 F.2d 1028, 1039 (2d cir. 1990); Abdul Wali v. Coughlin, 754 F.2d 1015, 1026 (2d Cir. 1985).[5]

The Second Circuit has repeatedly stressed the importance of a showing of irreparable harm by the movant. "An applicant for a preliminary injunction 'must

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[5] The requirement of irreparable harm remains the same, however, whether the relief sought is mandatory or prohibitive. See Abdul Wali, supra, 754 F.2d at 1026. Because plaintiff's motion should be denied on the basis of failure to show irreparable harm, it is, in the final analysis, of no consequence whether the relief sought is deemed to be mandatory or prohibitive.

show that it is likely to suffer irreparable harm if equitable relief is denied.' Thus, a mere possibility of irreparable harm is insufficient to justify the drastic remedy of a preliminary injunction." Borey v. National Union Fire Insurance Company of Pittsburgh, 934 F.2d 30, 33-34 (2d Cir. 1991) (quoting JSG Trading Corp., supra, 917 F.2d at 79) (emphasis in original). "[I]nequitable conduct alone cannot justify the entry of a preliminary injunction. The linchpin of such interim relief is that threatened irreparable harm will be prevented by that injunction." Buckingham Corp. v. Karp, 762 F.2d 257, 262 (2d Cir. 1985). "'Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicanis likely to suffer irreparable harm

before a decision on the merits can be rendered.'" Citibank, N.A. v. Citytrust, 756 F.2d 273, 275 (2d Cir. 1985) (quoting Bell & Howell: Mamiya Co. v. Masel Supply Corp., 719 F.2d 42, 45 (2d Cir. 1983)); Mulligan, Forward, Preliminary Injunction in the Second Circuit, 43 Brooklyn L. Rev. 831, 833 (1977) (showing of irreparable harm is fundamental and traditional requirement in any action where preliminary injunctive relief is sought).

In two recent cases similar to the case at bar, the Second Circuit has reversed the district court's granting of preliminary injunctive relief. In American Postal Workers Union v. United States Postal Service, 766 F.2d 715 (2d Cir. 1985), cert. denied, 475 U.S. 1046 (1986), a postal workers union local president had written a letter to a major customer of

the New London Connecticut Post Office, stating that recent personnel cuts at the post office had resulted in serious delays in mail delivery. The Postal Service conducted an investigation and found that the president's letter constituted "conduct prejudicial to the interest of the Postal Service," and thereafter informed the president -- who was also a postal employee -- that he would be fired in thirty days. The president, as well as his union, then moved for a preliminary injunction barring his discharge pending the outcome of a grievance procedure. The district court granted the injunction, holding that the potentially chilling effect on the first amendment rights of the president and others in the union constituted irreparable harm sufficient to warrant injunctive relief.

On appeal, the Second Circuit reversed, finding that irreparable harm had not been shown. American Postal Workers, supra, 766 F.2d at 722. The Court noted first "[w]ith regard to irreparable harm, in Sampson v. Murray, 415 U.S. 61, 91-92 (1974), the Supreme Court articulated a particularly stringent standard for irreparable injury in government personnel cases. . . . According to the Sampson Court, except in a 'genuinely extraordinary situation,' irreparable harm is not shown in employee discharge cases simply by a showing of financial distress or difficulties in obtaining other employment." American Postal Workers, supra,

766 F.2d at 721 (quoting Sampson, supra, 415 U.S. at 92 n.68).[6]

The Second Circuit then turned to the issue of the chilling of first amendment rights, noting that such chilling would constitute irreparable injury, American Postal Workers, supra, 766 F.2d at 721, and finding that the president's letter implicated first amendment rights because it addressed a matter of public concern. American Postal Workers, supra, 766 F.2d at 721-22. However, the Court held, irreparable harm had not in fact been demonstrated, stating that "appellees herein have failed to allege a clearcut

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[6] The Sampson Court also held that, in general, damage to reputation "falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case." Sampson, supra, 415 U.S. at 91-92 and n. 68.

infringement of first amendment rights which, absent preliminary injunctive relief, either has occurred or will occur in the future." American Postal Workers, supra, 766 F.2d at 722. "More importantly," the Court went on to explain,

> we fail to understand how a chilling of the right to speak or associate could logically be thawed by the entry of an interim injunction, since the theoretical chilling of protected speech and union activities stems not from the interim discharge, but from the threat of permanent discharge, which is not vitiated by an interim injunction.

American Postal Workers, supra, 766 F.2d at 722.

The Second Circuit reaffirmed this holding in Savage v. Gorski, 850 F.2d 64 (2d Cir. 1988), where the Court reversed the district court's granting of a preliminary injunction that barred the discharge of public employees on the basis

of their political beliefs. Citing and quoting American Postal Workers at length, the Second Circuit reiterated that

> [s]ince the source of the 'chill' is the permanent loss of appellees' jobs, retaining those positions pending resolution of the case will do nothing to abate that effect. . . . Since reinstatement and money damages could make appellees whole for any loss suffered during this period, their injury is plainly reparable and appellees have not demonstrated the type of harm entitling them to injunctive relief.

Savage, supra, 850 F.2d at 67-68; see also Rao v. New York Health and Hospitals Corp., 1990 U.S. Dist. LEXIS 16455 (S.D.N.Y. Dec. 6, 1990) (Leval, J.), motion for reargument denied, 1991 U.S. Dist. LEXIS 4865 (S.D.N.Y. April 12, 1991) (denying preliminary injunction in retaliatory discharge case alleging infringement of first amendment rights, noting that "the Second Circuit has held that a

preliminary injunction would not cure any irreparable harm.") (citing Savage, supra, 850 F.2d at 67-68, and American Postal Workers, supra, 766 F.2d at 722).

The logic underlying the holdings in Savage and American Postal Workers is equally applicable in the case at bar, and requires denial of plaintiff's motion for preliminary injunctive relief. First, plaintiff repeatedly admits that his speech has not been chilled, see Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction at 16; Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction at 9, and the evidence of chilling of other PVB employees is unpersuasive and of little or

no relevance.[7] Moreover, because the source of any "chill" on the first amendmenrights of either plaintiff or other PVB employees is the permanent loss of plaintiff's job, the interim injunctive relief plaintiff seeks in his instant motion will do nothing to thaw that chill. See Savage, supra, 850 F.2d at 67-68; American Postal Workers, supra, 766 F.2d at 722; Rao, supra, 1991 WL 64455, 1991 U.S. Dist. LEXIS 4865.[8]

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[7] See supra note 4. PVB Administrative Law Judge Harold Berman testified that he was concerned about the possible "negative consequences" for his career at PVB stemming from his appearance at the hearing. However, he never stated that this concern was in any manner connected to plaintiff's transfer; indeed it could just as well be due to the ordinary reluctance of any employee to take an action that he believes might be perceived by his employer as antagonistic to the employer's interest.

[8] This conclusion is, in fact, reinforced by the fact that the eight anonymous PVB employees are unwilling to make their affidavits public.

Plaintiff attempts to distinguish the instant case from Savage and American Postal Workers by arguing that those cases involved the indirect infringement of first amendment rights, whereas in the present action plaintiff's right to freedom of speech is being directly violated. Plaintiff then asks this Court to presume irreparable harm. However, plaintiff is incorrect when he claims that the alleged restriction on his first amendment rights is a direct one. Plaintiff is -- as he has conceded -- free to speak on issue of concern to him. The Second Circuit cases cited by plaintiff involved direct infringement of first amendment rights, such as the denial of permits to religious organizations for use of school premises, Deeper Life Christian Fellowship, Inc. v. Board of Education of

the City of New York, 852 F.2d 676, 679 (2d Cir. 1988), an ordinance prohibiting topless dancing, Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 (2d Cir. 1974), aff'd in part, rev'd in part, 422 U.S. 922 (1975), and a rule prohibiting the solicitation of funds in schools, Katz v. McAulay, 438 F.2d 1058, 1060 n. 3 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972). These cases are, therefore, clearly inapposite to the case at bar.[9]

Finally, a related consideration is plaintiff's considerable delay in seek-

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[9] Plaintiff's reliance on Elrod v. Burns, 427 U.S. 347 (1976) is also misplaced. In that case, a three-justice plurality of the Supreme Court found irreparable harm where "[i]t [was] clear . . . that First Amendment interests were either threatened or in fact being impaired at the time relief was sought." Elrod, supra, 427 U.S. at 373. Such is not the case in the present action, and for that reason among others, the Second Circuit distinguished Elrod in both Savage, 850 F.2d at 67, and American Postal Workers, 766 F.2d at 722.

ing injunctive relief. The Second Circuit has observed that "[p]reliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action. . . . Although a particular period of delay may not rise to the level of laches and thereby bar a permanent injunction, it may still indicate an absence of the kind of irreparable harm required to support a preliminary injunction." Citibank, N.A., supra, 756 F.2d at 276. Shortly after its decision in Citibank, N.A., the Second Circuit further held in Majorica, S.A. v. R.H. Macy & Co., Inc., 762 F.2d 7, 8 (2d Cir. 1985), that "[l]ack of diligence, standing alone, may

... preclude the granting of preliminary injunctive relief, because it goes primarily to the issue of irreparable harm....." See also Borey, supra, 934 F.2d at 35 (delay in seeking preliminary injunction belies claim of irreparable harm); Abish v. Northwestern National Insurance Co., 924 F.2d 448, 454 (2d Cir. 1991) (same); Railroad P.B.A. of the State of New York, Inc. v. Metro-North Commuter Railroad, 699 F.Supp. 40, 43 (S.D.N.Y. 1988) (delay in seeking enforcement of rights undercuts argument that injunctive relief is necessary); Manhattan State Citizens' Group, Inc. v. Bass, 524 F.Supp. 1270, 1275 (S.D.N.Y. 1981) (delay in seeking preliminary injunction "militates against the claim of irreparable injury and may be ground for barring injunctive relief."). These conclusions are consistent with the

ancient maxim that "equity aids the vigilant, not those who slumber on their rights." 11 Wright & Miller, Federal Practice and Procedure § 2946 at 417 (1973).

In the instant case, plaintiff was informed of his discharge on May 24, 1990, and that discharge was made effective June 1, 1990. Plaintiff did not commence this action, however, until May 22, 1991, almost one year later. This delay in seeking relief bosters the Court's conclusion that there has been an insufficient showing of irreparable harm to justify issuance of a preliminary injunction.[10]

In the absence of irreparable harm, "which constitutes an absolute re-

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[10] The pendency of the DOI investigation during much of this period is irrelevant to this analysis.

quirement for an award of injunctive relief," American Postal Workers, supra, 766 F.2d at 723, the Court need not consider the further requirements for the granting of a preliminary injunction.

Conclusion

For the reasons stated above, plaintiff's motion for a preliminary injunction is denied.

SO ORDERED.

New York, New York
July 16, 1991

/s/
U.S.D.J.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthosue in the City of New York, on the nineteenth day of December one thousand nine hundred and ninety-one.

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VINCENT F. COSTELLO, :

Plaintiff-appellant, :

v. :

THOMAS A. MCENERY, in his official and individual capacities; LUCIUS J. RICCIO, in his official capacity as Commissioner of the Department of Transportation of the City of New York; THE PARKING VIOLATIONS BUREAU OF THE CITY OF NEW YORK; THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK; and THE CITY OF NEW YORK, : Docket Number: 91-7741

Defendants-appellees. :

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein

by Plaintiff-appellant VINCENT F. COSTELLO.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/
ELAINE B. GOLDSMITH,
Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides that:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.§ 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New York Administrative Code § 12-113 provides that:

> Protection of sources of information a. No officer or employee of an agency of the city, the head or members of which are appointed by the mayor shall take an adverse personnel action with respect to another officer or employee in retaliation for his or her making a report of information concerning conduct which he or she knows or

reasonably believes to involve corruption, criminal activity or conflict of interest by another city officer or employee, which concerns his or her office or employment, or by persons dealing with the city, which concerns their dealings with the city, (i) to the commissioner of investigation, or (ii) to a council member, the president of the council or the comptroller, who shall refer such report to the commissioner of investigation.

b. An officer or employee who believes that another officer or employee has taken an adverse personnel action in violation of subdivision a of this section may report such action to the commissioner of investigation.

c. Upon receipt of a report made pursuant to subdivision b of this section, the commissioner of investigation shall conduct an inquiry to determine whether a retaliatory adverse personnel action has been taken.

d. Upon a determination that a retaliatory adverse personnel action has been taken, the commissioner of investigation shall without undue delay report his or her findings and,

if appropriate, recommendations to the head of the appropriate agency, who (i) shall take remedial action, including but not limited to the reinstatement of the officer or employee to a position the same or comparable to the position held prior to the adverse personnel action, when such reinstatement is appropriate, and (ii) shall report such action to the commissioner of investigation in writing. Upon a determination that the agency head has failed to take appropriate remedial action, the commissioner of investigation shall consult with the agency head and afford the agency head reasonable opportunity to take such action. If such action is not taken the commissioner of investigation shall report his or her findings and the response of the agency head to the mayor, who shall take such action as is deemed appropriate.

e. Nothing in this section shall be construed to limit the rights of any officer or employee with regard to any administrative procedure or judicial review.

f. For the purpose of this section the term "adverse personnel action" shall include dismissal, demotion, suspension, disciplinary action, negative

performance evaluation, any action resulting in loss of staff, office space or equipment or other benefit, failure to appoint, failure to promote, or any transfer or assignment or failure to transfer or assign against the wishes of the affected officer or employee.

g. Violation of this section may constitute cause for administrative penalties.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VINCENT F. COSTELLO, Plaintiff, against THOMAS A. MCENERY, in his official and individual capacities; LUCIUS J. RICCIO, in his official capacity as Commissioner of the Department of Transportation of the City of New York; THE PARKING VIOLATIONS BUREAU OF THE CITY OF NEW YORK; THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK; and THE CITY OF NEW YORK, Defendants.	Civil Action No. 91-Civ-3475 (PKL) (NP3925) NOTICE OF MOTION

PLEASE TAKE NOTICE, that Plaintiff Vincent F. Costello hereby moves this Court for an Order preliminarily enjoining Defendants:

1. To reinstate Vincent F. Costello to his position as Director of Operations at the New York City Department of Transportation, Parking Violations Bureau;

2. To discontinue taking adverse personnel actions against Vincent F. Costello including but not limited to refusing or failing to assign Plaintiff any job duties commensurate with his seniority and managerial rank;

3. To continue paying Vincent F. Costello his present salary and maintain his present managerial rank throughout the course of this proceedings; and

4. Not to report their adverse personnel actions to any potential or future employer of Vincent F. Costello.

This motion is returnable at the United States Courthouse for the United States District Court for the Southern District of New York, before the Honorable Peter K. Leisure, 40 Centre Street, New York, New York at 10:00 a.m. on the 10th day of June, 1991.

Dated: New York, New York
May 23, 1991

/s/
Nicholas J. Pappas
(NP-3925)
919 Third Avenue
Room 31-56
New York, New York 10022
(212) 735-3000

Attorney for Plaintiff
Vincent F. Costello

Copies to:
City of New York Law Department
Thomas A. McEnery

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VINCENT F. COSTELLO, Plaintiff, against THOMAS A. MCENERY, in his official and individual capacities; LUCIUS J. RICCIO, in his official capacity as Commissioner of the Department of Transportation of the City of New York; THE PARKING VIOLATIONS BUREAU OF THE CITY OF NEW YORK; THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK; and THE CITY OF NEW YORK, Defendants.	Civil Action No. (NP-3925) (PKL). COMPLAINT - JURY TRIAL DEMANDED

Plaintiff Vincent F. Costello ("Plaintiff"), by and through his attorney, for his complaint ("Complaint") al-

leges upon knowledge with respect to himself and his own acts and upon information and belief as to all other matters, as follows:

I. NATURE OF THE ACTION

1. Plaintiff brings this action pursuant to 42 U.S.C. § 1983, The First and Fourteenth Amendments to the United States Constitution, Articles Six, Eight and Eleven of the New York State Constitution, N.Y. Civil Service Law § 75-b and N.Y. Civil Service Law § 75 to reverse his removal and transfer from his employment as Director of Operations at the Parking Violations Bureau of the City of New York and to end the Defendant's continued refusal or failure to assign him work. Defendants removed and transferred Plaintiff to retaliate against him for calling attention to certain illegal and unethical

policies and practices being implemented by the Parking Violations Bureau from 1988 through mid-1990. Defendants' refusal or failure to assign him work continues this retaliation.

2. Plaintiff spoke out about the illegal and unethical policies and practices of the Parking Biolations Bureau to his supervisor, defendant Thomas A. McEnery, and to other City employees. Plaintiff's statements to McEnery and others concerned, among other matters, the Parking Violations Bureau's collection of parking fines from persons who committed no parking violations and the Parking Violations Bureau's failure to refund overpayments of parking fines to the public.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to 29 U.S.C. §§ 1331, 1343(3), 2201, 2202 and the Court's pendent jurisdiction.

4. Venue lies in this district pursuant to 28 U.S.C. § 1391(b).

III. PARTIES

5. Defendant City of New York ("City") is and at all times relevant to this action was a municipal corporation and political subdivision of the State of New York.

6. Defendant Department of Transportation ("DOT") is and at all times relevant to this action was an agency of the City.

7. DOT's functions include management of its personnel, promulgation and enforcement of City parking and traffic rules and regulations, and maintaining and regulating City highways, ferries and mass transportation facilities.

8. Defendant Parking Violations Bureau ("PVB") is and at all times relevant to this action was a subdivision of DOT and an agency of the City.

9. PVB's functions include management of its personnel and enforcement and adjudication of the City's parking rules and regulations.

10. PVB is organized in five divisions as follows: Collections, Enforcement, Help Center, Controller's and Operations.

11. Defendant Lucius Riccio ("Riccio") is and at all times relevant to this action was the Commissioner of DOT.

12. With respect to personnel matters at DOT, Riccio exercises policy-making authority for the City and DOT.

13. On information and belief Riccio is a citizen of the State of New York.

14. Defendant Thomas A. McEnery ("McEnery") is and at all times relevant to this action was the Deputy Commissioner/Director of the PVB and was Plaintiff's supervisor and agency head from on or about February 22, 1988 through on or about May 24, 1990.

15. On information and belief McEnery is a citizen of the State of New York.

16. With respect to personnel matters at the PVB, McEnery exercises policy-making authority for the City, DOT and PVB.

17. Plaintiff Vincent F. Costello is a citizen of the State of New York.

18. Plaintiff is a permanent civil servant for the City and a veteran of the United States armed forces, having served in the United States Army from July 27, 1969 through July 26, 1971.

IV. BACKGROUND

19. The City hired Plaintiff for the position of Director of PVB's Operations Division on or about May 24, 1980, in which capacity Plaintiff worked until on or about May 24, 1990, the date of Plaintiff's removal and transfer. As Director of PVB's Operations Division,

Plaintiff directed approximately 160 PVB employees. The Operations Division was responsible for processing parking violation summonses brought in by law enforcement agencies to resolve complaints and claims by the public regarding those summonses.

20. Plaintiff reported to the Director and the Assistant Director at PVB. During Plaintiff's tenure at PVB, Plaintiff received consistently oustanding performance evaluations from his superiors.

21. Beginning in or about early 1988, Plaintiff began calling to the attention of McEnery and other PVB officials to certain illegal and unethical policies and practices of PVB. Plaintiff called the following policies or practices, among

others, to the attention of McEnery and other PVB officials:

(a) PVB's programming of its computer to decrease its accuracy so that it mailed citizens summonses for violations not attributable to those citizens.

(b) PVB's failure to make a claim against the vendor of PVB's computer system for the failure of the computer system to operate as the vendor had promised in its contract with the City. On information and belief, the failure to make a timely claim will cost the City over $11 million dollars to correct.

(c) PVB's failure to notify citizens that they made double payments or overpayments of parking fines or to refund such double payments or overpayments to those citizens. On information

and belief PVB collected approximately $19.1 million in such double payments or overpayments from in or about January 1988 through October 1989.

(d) PVB's failure to apply proper accounting procedures in regard to collection of parking violation judgments by City Marshalls and PVB's failure to refund to citizens funds improperly collected by City Marshalls.

(e) PVB's failure to refund overpayments by citizens for interest improperly charged by PVB's computer. On information and belief these overpayments totalled approximately $285,000.

(f) PVB's mailing of letters to citizens with small outstanding parking fines falsely threatening collection actions against those citizens including garnishment of wages, bank account

restraint and towing of vehicles in cases where PVB had no intention of taking such actions.

(g) PVB's instructions to Administrative Law Judges to find persons guilty of parking violations in those cages where PVB could not establish a prima facie case.

(h) PVB's use of an inadequate number of private collection agencies.

22. Plaintiff in good faith believed and continues to believe that these policies and practices were illegal and unethical.

23. Plaintiff repeatedly called these matters to the attention of McEnery and other PVB officials between, in or about March 1988 until the date of his

removal and transfer on or about May 24, 1990.

24. Neither McEnery nor any other PVB official corrected PVB's aforementioned policies or practices prior to Plaintiff's removal and transfer.

25. Plaintiff informed McEnery that if PVB's illegal and unethical policies and practices were not corrected that Plaintiff would bring the matter to the attention of the appropriate governmental authorities.

26. On or about May 14, 1990, Plaintiff publicly discussed certain of PVB's illegal and unethical policies and practices in McEnery's presence

27. At a meeting on or about May 24, 1990, McEnery removed Plaintiff from his post as Director of Operations effective June 1, 1990.

28. McEnery stated that the reason for Plaintiff's removal was that Plaintiff had held his old position "too long" and that "it was time for a change."

29. McEnery offered Plaintiff the previously nonexistent position of Director of Quality Control. Said position was not a position of equivalent rank and responsibility as Plaintiff's previous position as Director of Operations.

30. McEnery's stated reasons for removing Plaintiff were, upon information and belief, pretextual. McEnery's true reason for removing Plaintiff was to retaliate against him because of his speaking out regarding illegal and unethical policies and practices of PVB.

31. On information and belief, in removing Plaintiff from his position as Director of Operations, McEnery acted maliciously or with reckless or callous indifference to Plaintiff's constitutional rights.

32. At no time has the City given Plaintiff a hearing as to whether or not his removal and transfer were lawful.

33. On or about May 30, 1990, Plaintiff and other PVB employees reported the adverse personnel action taken against Plaintiff to Andrew Stein, New York City Council President. Andrew Stein referred the matter to the New York City Department of Investigation ("DOI"). Beginning in or about July 1990, DOI began an investigation of Plaintiff's removal and transfer.

34. Andrew Stein informed Riccio of the facts outlined in this Complaint and by failing to reverse McEnery's unlawful removal and transfer of Plaintiff, Riccio willfully or recklessly ratified and aided McEnery's unlawful actions.

35. Between on or about May 24, 1990 and the date of this Complaint, Plaintiff has been assigned random and menial administrative, clerical and maintenance functions in DOT's Legal Affairs Division.

36. Assignment of these duties constituted a transfer from Plaintiff's prior employment at PVB.

37. Defendants have knowingly failed and refused to assign Plaintiff any job duties since his removal and transfer from his position as Director of Operations.

38. Plaintiff has repeatedly reported the circumstances of his removal and transfer as well as Defendants willful failure to assign him any job duties to the Mayor of the City of New York and to the Director of the Department of Personnel of the City of New York. Neither the Mayor nor the Director would take any action until the completion of DOI's investigation.

39. Plaintiff has repeatedly requested that DOI complete its investigation in a timely fashion. As of the date of this Complaint, months after commencement, DOI has not completed its investigation.

40. By refusing to take action, the Mayor and the Director of the Department of Personnel willfully or recklessly aided and ratified McEnery's unlawful

actions.

41. Defendants' conduct has damaged Plaintiff's honor, integrity and reputation and caused Plaintiff pain and suffering.

42. Although Plaintiff's salary has remained unchanged from the date of his removal and transfer to of the date of this Complaint, City officials have informed Plaintiff that his salary and managerial rank was subject to reduction at any time.

43. Plaintiff has served Defendants with a Notice of Claim outlining the claims asserted in this Complaint more than thirty days prior to the date on which this Complaint was filed. Plaintiff has satisfied all other conditions precedent to the filing of this Complaint.

V. CLAIMS FOR RELIEF

COUNT I

Deprivation of Right to Free Speech

44. Plaintiff repeats, realleges and incorporates herein each of the allegations in paragraphs 1 through 43 with the same force and effect as if set forth here in full.

45. By removing and transferring Plaintiff to retaliate against him for his speech on issues of public concern and by failing or refusing to assign him any job duties since that time, Defendants deprived Plaintiff of his rights secured by the First and Fourteenth Amendments of the United States Constitution, in violation of 42 U.S.C. § 1983.

46. By removing and transferring Plaintiff to retaliate against him for his speech on issues of public concern

and by failing or refusing to assign him any job duties since that time, Defendants likewise violated Article Eight of the New York State Constitution.

COUNT II

Deprivation of Property Without Due Process of Law

47. Plaintiff repeats, realleges and incorporates herein each of the allegations in paragraphs 1 through 43 with the same force and effect as if set forth here in full.

48. By removing and transferring Plaintiff without just cause and without first affording Plaintiff a hearing, Defendants deprived Plaintiff of his property right in his employment secured by the Due Process Clause of the Fourteenth Amendment of the United States

Constitution, in violation of 42 U.S.C. § 1983.

49. By removing and transferring Plaintiff without just cause and without first affording Plaintiff a hearing, Defendants likewise violated Article Six of the New York State Constitution.

COUNT III

Deprivation of Liberty Without Due Process of Law

50. Plaintiff repeats, realleges and incorporates herein each of the allegations in paragraphs 1 through 43 with the same force and effect as if set forth here in full.

51. By removing and transferring Plaintiff to retaliate against him for his speech regarding illegal and unethical policies and practices of the PVB and by failing or refusing to assign him

any job duties since that time, Defendants damaged Plaintiff's good name, reputation, honor and integrity. Defendants thereby deprived Plaintiff of his right to liberty provided by the Due Process Clause of the Fourteenth Amendment of the United States Constitution, in violation of 42 U.S.C. § 1983.

52. By removing and transferring Plaintiff to retaliate against him for his speech regarding illegal and unethical policies and practices of the PVB and by failing or refusing to assign him any job duties since that time, Defendants likewise violated Article Six of the New York State Constitution.

COUNT IV

Deprivation of Equal Protection of the Laws and Due Process of Law

53. Plaintiff repeats, real-

leges and incorporates herein each of the allegations in paragraphs 1 through 43 with the same force and effect as if set forth here in full.

54. By removing and transferring Plaintiff to retaliate against him for his speech regarding illegal and unethical policies and practices of the PVB and by failing or refusing to assign him any job duties since that time, Defendants acted without any reasonable basis related to any legitimate public concern.

55. Defendants thereby unlawfully discriminated against Plaintiff and deprived Plaintiff of his rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, in violation of 42 U.S.C. § 1983.

56. By removing and transfer-

ring Plaintiff to retaliate against him for his speech regarding illegal and unethical policies and practices of the PVB and by failing or refusing to assign him any job duties since that time, Defendants likewise violated Articles Six and Eleven of the New York State Constitution.

COUNT V

N.Y. Civil Service Law § 75-b

57. Plaintiff repeats, realleges and incorporates herein each of the allegations in paragraphs 1 through 43 with the same force and effect as if set forth here in full.

58. By removing and transferring Plaintiff to retaliate against him for his speech regarding illegal and unethical policies and practices of the PVB and by failing or refusing to assign him any job duties since that time, Defendants

performed an adverse personnel action in violation of N.Y. Civil Service Law § 75-b.

COUNT VI

N.Y. Civil Service Law § 75

59. Plaintiff repeats, realleges and incorporates herein each of the allegations in paragraphs 1 through 43 with the same force and effect as if set forth here in full.

60. By removing and transferring Plaintiff without a hearing as to the just cause for said action and without a finding that Plaintiff committed acts of misconduct or incompetence justifying Plaintiff's removal from office and/or issuance of a disciplinary penalty, Defendants violated N.Y. Civil Service Law § 75.

VI. DEMAND FOR JURY TRIAL

61. Plaintiff demands a trial by jury on all issues triable by a jury.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that judgment be entered:

A. Declaring that by removing and transferring Plaintiff from his position as Director of Operations at PVB and by failing or refusing to assign him any job duties since that time, Defendants deprived Plaintiff of his rights under the Free Speech, Due Process and Equal Protection Clauses of the United States Constitution, in violation of 42 U.S.C. § 1983;

B. Declaring that by removing and transferring Plaintiff from his position as Director of Operations at PVB and by failing or refusing to assign him any job duties since that time, Defendants

deprived Plaintiff of his rights under the Free Speech, Due Process and Equal Protection Clauses of the New York State Constitution;

C. Declaring that Defendants' failure to provide Plaintiff a hearing prior to his removal and transfer deprived Plaintiff of rights protected by the Due Process Clause of the United States Constitution in violation of 42 U.S.C. § 1983;

D. Declaring that Defendants' failure to provide Plaintiff a hearing prior to his removal and transfer violated the New York State Constitution and N.Y. Civil Service Law § 75;

E. Declaring that by removing and transferring Plaintiff from his position as Director of Operations at PVB and by failing to assign him any job duties

since that time Defendants violated N.Y. Civil Service Law § 75-b;

F. Preliminarily and permanently enjoining Defendants to reinstate Plaintiff to his position as Director of Operations at PVB;

G. Preliminarily and permanently enjoining Defendants to cease taking adverse personnel actions against Plaintiff to retaliate against him for speaking about issues of public concern including but not limited to failing or refusing to assign Plaintiff any job duties commensurate with his managerial rank and his seniority;

H. Enjoining Defendants to conduct hearings prior to taking adverse personnel actions against Plaintiff and to take adverse personnel actions only upon

finding that Plaintiff committed acts of misconduct or incompetence;

I. Enjoining Defendants to expunge Plaintiff's personnel records of any mention of Defendants' adverse personnel actions;

J. Preliminarily and permanently enjoining Defendants from reporting their adverse personnel actions to any potential or future employers or supervisors of Plaintiff;

K. Granting Plaintiff a sum of money, to be determined at trial but believed to be not less than fifteen million dollars, that will compensate Plaintiff for present and future damage to Plaintiff's honor, integrity, reputation and good name and for the pain and suffering occasioned by Defendants' actions;

L. Granting Plaintiff costs, disbursements and attorney's fees;

M. Preliminarily enjoining Defendants from reducing Plaintiff's salary or managerial rank during the pendency of this case;

N. As to Defendant McEnery in his personal capacity, punitive damages in the amount of one million dollars; and

O. Granting Plaintiff such other relief as the Court deems just and proper.

Dated: New York, New York
May 22, 1991

/s/
Nicholas J. Pappas
(NP-3925)
919 Third Avenue
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Attorney for Plaintiff
Vincent F. Costello

Supreme Court, U.S.
FILED
MAY 20 1992
OFFICE OF THE CLERK

No. 91-1519

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VINCENT F. COSTELLO,

Petitioner,

-against-

THOMAS A. McENERY, in his official and individual capacities; LUCIUS J. RICCIO, in his official capacity as Commissioner of the Department of Transportation of the City of New York; THE PARKING VIOLATIONS BUREAU OF THE CITY OF NEW YORK; THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK; and THE CITY OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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May 20, 1992.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Where a public employee claims that he has been improperly transferred from a government position because he criticized certain agency policies and procedures, but where he also concedes that his First Amendment right to articulate such criticisms has in no way been "chilled" by the transfer, does the allegation of interference with the exercise of First Amendment rights in the workplace establish irreparable injury per se for injunctive purposes, thereby requiring temporary reinstatement of the employee to his former position pending trial of the underlying issues?

2. At a hearing on a motion seeking preliminary injunctive relief, is it proper for a Court to conclude that irreparable injury has not been demonstrated, where the evidence presented is inadequate to establish that the plaintiff's fellow employees have been "chilled" in the exercise of their First

Amendment rights, much less that temporary reinstatement would abate any such effect, if it in fact existed?

LIST OF PARTIES

Respondents accept the list of parties provided by petitioner.

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POINT I

WHERE A PUBLIC EMPLOYEE CLAIMS THAT HE HAS BEEN TRANSFERRED BECAUSE HE CRITICIZED CERTAIN AGENCY POLICIES AND PROCEDURES, BUT WHERE HE ALSO CONCEDES THAT HIS FIRST AMENDMENT RIGHT TO ARTICULATE SUCH CRITICISMS HAS IN NO WAY BEEN INTERFERED WITH BY THE TRANSFER, IT IS NOT AN ABUSE OF DISCRETION TO REFUSE TO REINSTATE THE EMPLOYEE TO

HIS FORMER POSITION PENDING TRIAL. UNDER SUCH CIRCUMSTANCES, THERE IS NO "IRREPARABLE INJURY" CAPABLE OF BEING ABATED BY REINSTATEMENT, AND THE DECISION OF THE COURT OF APPEALS TO THAT EFFECT IS FULLY IN ACCORD WITH ALL APPLICABLE AUTHORITIES. 26

POINT II

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No. 91-1519

IN THE
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OCTOBER TERM, 1991

VINCENT F. COSTELLO,

Petitioner,

-against-

THOMAS A. McENERY, in his official and individual capacities; LUCIUS J. RICCIO, in his official capacity as Commissioner of the Department of Transportation of the City of New York; THE PARKING VIOLATIONS BUREAU OF THE CITY OF NEW YORK; THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK; and THE CITY OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

(1)

The Factual Background

The plaintiff in the instant action (hereafter referred to as "petitioner")

served as Director of Operations with the respondent City's Parking Violations Bureau ("PVB") from May or June of 1980 through June 1, 1990, when he was transferred to another division within the same agency (32, 34, 47, 100, 270).[1]

During his tenure as head of the Operations Division, petitioner received generally favorable evaluations by his supervisors, except with respect to his ability to work productively with fellow executive staff (147-158). One supervisor noted on the evaluation form that "at times [petitioner's] lack of control of emotions at meetings seriously detracted from [his] otherwise professional manner" (440-441). Petitioner did not agree with this assessment

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[1] Unprefixed numbers in parentheses refer to pages in the Joint Appendix filed in the U.S. Court of Appeals for the Second Circuit. Numbers preceded by the letter "A" refer to pages in the Appendix to the instant petition.

of his behavior (441). However, when respondent McEnery became Director of the PVB in February 1988, petitioner was reporting to the agency's legal counsel because he had previously had difficulty working with other executive staff members (263).[2]

In March of 1988, petitioner wrote the first of a long series of memos, directed to

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[2] The independent report released by New York City's Department of Investigation ("DOI") in June 1991, in response to petitioner's charge that his transfer was in retaliation for his alleged whistle-blowing activities, notes evidence of "a history of conflict and disagreement between [petitioner] and virtually all other PVB managers" (216). It also details specific instances of his "divisive manner" and inability to work constructively with his peers (230-233). Further instances of petitioner's disruptive behavior were provided by one of his former colleagues at the hearing held by the District Court on the motion at issue here. She described discussions of issues at staff meetings degenerating into personal attacks by petitioner on staff disagreeing with his views and was of the opinion that petitioner's presence made it impossible to conduct any agency business (460-465).

his colleagues and superiors, whose critical content petitioner claims resulted in his removal as Director of Operations (11-14, 136). These memos covered topics as diverse as the agency's use of a highly complex, recently installed computer system (35-37, 219-220); its policies on refunds (37, 60, 223); its procedures for enforcing judgments (38-39); and the content of a collection letter (40-41).

By the fall of 1989, petitioner, who is not a lawyer, had turned his attention to a legal matter, disagreeing with the agency's interpretation of a state court decision (41, 85-86, 221). He could not be persuaded that there was another, valid point of view, even after respondent McEnery consulted with the City's Corporation Counsel and the Corporation Counsel's office issued a formal opinion validating the agency's position (42, 43, 44, 88-90, 221-222, 264-265, 268). All of petitioner's complaints were reiterated on

a regular basis at executive staff meetings (39, 41, 221-222).

By mid-1989, respondent McEnery had become concerned with what he characterized as petitioner's "increasingly negative attitude, confrontational style, difficulty in getting along with peers and supervisors, and preoccupation with a limited number of issues" (266-267). Petitioner habitually insulted and belittled other staff members at executive meetings, meetings which respondent McEnery had been required to interrupt "more than once" to defuse angry confrontations initiated by petitioner (266).

Petitioner had also become "preoccupied with his criticisms, using every staff meeting as a forum for airing his views," thus making it "more and more difficult to address other issues" when petitioner was present (266). In addition, respondent McEnery believed that petitioner had become "rigid and isolated" as Director of the Operations

Division, resisting efforts by the Director and Deputy Director of the agency to obtain information about the operation of petitioner's division and making it difficult for them to supervise and coordinate effectively (267).[3]

Respondent McEnery presented the idea of transferring petitioner to the Commissioner of DOT at the end of 1989, and he then discussed it with the new Commissioner, respondent Riccio, when he

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[3] The June 1991 DOI report contains evidence of similar assessments from other sources (231-233). In a March 1989 memorandum, petitioner's immediate supervisor described his inability to take direction and constructive criticism, noting that petitioner's "perception that no other PVB employees were interested in serving the public was insulting and a disservice to his colleagues" (231). Eight months later the same supervisor, in a memorandum dated November 15, 1989, reminded respondent McEnery of earlier discussions concerning petitioner's "divisive behavior" and "defiance of all direction," urging respondent McEnery to discuss petitioner's reassignment within the Department of Transportation ("DOT") with senior DOT managers (232-233).

assumed charge of the agency in early 1990 (268, 471). In the meantime, in response to a series of audit reports issued in late 1989 and early 1990 by the State Comptroller's Office calling for additional quality controls at PVB, the agency had decided to create the new position of Director of Quality Control and Project Implementation (267). Respondent McEnery did not initially have petitioner in mind for this slot, but, after the decision to transfer him had been made, respondent McEnery believed that the position's "watchdog and public information functions" would provide a constructive outlet for petitioner's energies (233, 268, 470). Accordingly, on April 4, 1990, after obtaining the Commissioner's approval, defendant McEnery began drafting a memo to the staff announcing creation of the new directorship, petitioner's appointment to the position, and other proposed agency changes (268, 310-311, 470).

Some six weeks later, on May 14, 1990, petitioner and defendant McEnery attended a dinner hosted by the Association of PVB Administrative Law Judges at which petitioner received the Association's "Administrator of the Year Award" (44, 268-269). In a speech to the members, all of whom were employed at PVB and with many of whom petitioner had long-standing and close relationships (269), petitioner again voiced his views on the legal matter addressed in the Corporation Counsel's opinion (44). He also charged that PVB interfered with the ability of the ALJ's to be fair and impartial (44).

According to petitioner, this was his "first public statement regarding PVB's illegal and unethical policies and practices," and respondent McEnery allegedly "expressed his dissatisfaction" with petitioner's remarks (44). Respondent McEnery recalled that petitioner had expressed "the same criticisms

he had voiced over and over again in the past," but respondent McEnery did not remember "expressing dissatisfaction" and saw nothing particularly significant in the fact that petitioner had chosen to air his views to a group of PVB administrative law judges (268-269).

On May 24, 1990, approximately seven weeks after the transfer decision had been made and ten days after the administrative law judges' dinner, respondent McEnery informed petitioner that he intended to move him to the newly-created position of Director of Quality Control and Project Implementation, where petitioner would be at a comparable managerial level and receive the same salary (269). Petitioner rejected the offer of the new directorship outright on the ground that it was not comparable to his former position, and because respondent McEnery allegedly refused to describe or

document the position's scope and responsibilities (44-46, 233-234, 269).

On the following day, May 25, 1990, respondent McEnery asked petitioner, in a written memo, to reconsider the transfer. He also informed him that, if he still rejected the offer, petitioner would nevertheless be removed as Director of Operations, effective June 1, 1990 (47, 98, 136, 270).

The removal was confirmed by memorandum dated May 30, 1990 and petitioner was reassigned, at the same salary, to the DOT General Counsel's office (47, 100, 270). According to petitioner, he was given no responsibilities after his transfer and spent ninety percent of his time during the twelve months prior to commencement of the instant action doing absolutely nothing (48).

Upon receipt of respondent McEnery's May 30, 1990 removal memorandum, petitioner immediately contacted New York City Council

President Andrew Stein (47). In response, Council President Stein contacted the defendant DOT Commissioner (47, 102-103). He also requested that the City's independent Department of Investigation ("DOI") look into the circumstances surrounding petitioner's transfer and his allegation that he had been demoted for "whistle-blowing" activities (48, 214).

The DOI began an investigation in July of 1990, interviewing petitioner on July 20 and July 23 (48-49, 214). A DOI investigator allegedly informed petitioner that he could expect a report of the results by the end of September 1990 (49). However, DOI ultimately found it necessary to conduct 23 depositions and interviews with 21 PVB and DOT managers, including petitioner, and to review agency records over a five-year period (215). Its final report was not issued until nine months later, on June 11, 1991 (214-235).

After a detailed discussion of petitioner's various charges, the DOI report concluded that he had not been retaliated against for "whistle-blowing" activities, in contravention of the applicable statutes (230-234). Instead (234),

> . . . the evidence demonstrates that the disagreement between [petitioner] and PVB managers led to a lack of mutual respect, civility and a shared common agreement on the purpose and functions of PVB. For this reason, the PVB Director and Deputy Director decided to remove [petitioner] as Director of Operations, where he had substantial authority over PVB's management, and place him in a position where he had authority to comment and advise but not to direct PVB's operations.

Notwithstanding this assessment of petitioner's claim, DOI noted that petitioner's suggestions had often in fact been adopted by management (218), and it judged that "it would be unfortunate if [petitioner's] services, experience, and talents were to be lost" (234). However, the DOI also recognized that "it would be unwise to force

PVB senior managers to work with a person whom they perceive to have little respect for them or their efforts" (234), and it recommended that a managerial position be found for petitioner outside of PVB (235).[4]

(2)

Petitioner's Legal Challenge

On or about May 22, 1991, petitioner filed a complaint in the United States District Court for the Southern District of New York alleging, inter alia, that 42 U.S.C. § 1983 had been violated (1) by respondents' removal of petitioner from his managerial

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[4] In July or August of 1990, respondents had in fact informed petitioner of an opening as fiscal officer at the New York City Department of Records and Information Services, but petitioner declined to interview for the position (138-139). In June 1991, petitioner again refused to be interviewed for two positions within DOT because they were classified at a slightly lower managerial level than his former position and petitioner believed the jobs were therefore "not responsive to my legal claims" (139-140, 434-436, 450-451).

position at PVB on or about May 24, 1990, a year earlier; (2) by their transfer of petitioner to another division, at the same salary but without managerial responsibilities; and (3) by their failure to offer him an equivalent managerial position (1-18). According to petitioner these actions were undertaken in retaliation for the exercise of his First Amendment right to comment on certain PVB policies and practices which he considered illegal and unethical (7, 11, 15-17).[5]

The complaint itself sought both preliminary and permanent injunctive relief, in addition to declaratory relief and damages (15-18). The complaint's request for interim relief was duplicated in the simultaneously filed motion at issue here (28-29, 487).

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[5] The complaint also alleged due process and equal protection violations and set forth several pendent state claims not at issue on this appeal (11-15).

A hearing on petitioner's motion seeking reinstatement to his former position, pending trial of the underlying issues, was held on July 11, 1991 (374-482). Petitioner's request for interim relief was denied by an Order and Opinion of the United States District Court for the Southern District of New York (Leisure, D.C.J.), dated July 16, 1991 (A8-A36).

By order entered October 22, 1991, the United States Court of Appeals for the Second Circuit unanimously affirmed the District Court's order (A1-A6). On December 19, 1991, the same Court denied petitioner's request for a rehearing (A37-A38).

(3)

Opinion of the District Court

In an opinion reported at 767 F.Supp. 72, the District Court briefly reviewed the factual background and contentions of the parties before discussing the applicable legal

principles (A9-A20). Citing to relevant authority, the Court noted that, in the Second Circuit, the threshold inquiry is whether the applicant for a preliminary injunction has demonstrated that he or she is likely to suffer irreparable harm if equitable relief is denied (A20-A23). Only where a sufficient showing on this issue has been made is it necessary to consider whether the moving party has also established either (1) a likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor (A20-A22).

With respect to irreparable injury in cases alleging retaliatory action for the exercise of First Amendment rights in an employment situation, the District Court found two of the Second Circuit's recent decisions controlling, American Postal Workers Union v. United States Postal

Service, 766 F.2d 715 (2nd Cir., 1985), cert. denied, 475 U.S. 1046 (1986), and Savage v. Gorski, 850 F.2d 64 (2nd Cir., 1988) (A23-A30). American Postal Workers held that, although a chilling of First Amendment rights might, in certain circumstances, constitute irreparable injury, the plaintiff therein had not established the existence of a chilling effect on union activity by virtue of failure to reinstate the union's president pending an arbitrator's decision concerning the legality of his termination. The Court reasoned that the source of any alleged chill had to be the threat of permanent discharge and that such a threat could not be eliminated by an interim injunction (A23-A30). This holding was reiterated three years later in Savage v. Gorski, where the Second Circuit also noted that, because reinstatement and money damages could make whole any government employee allegedly dismissed for the First

Amendment exercise of political beliefs, the injury was "plainly reparable" (A28).

The District Court failed to find any basis on which American Postal Workers and Savage v. Gorski could be distinguished from the case at bar--particularly in light of petitioner's concession that his own First Amendment rights had not in fact been chilled either before or since his transfer, and given what the Court described as the "unpersuasive" and only marginally relevant evidence of the transfer's chilling effect on other PVB employees (A29-A30).[6] It

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[6] This evidence consisted of (1) a "declaration" by an attorney associated with petitioner's counsel summarizing the content of eight sworn affidavits purportedly establishing that the affiants were reluctant to report illegal agency activity because of petitioner's removal (245-248); and (2) testimony by an administrative law judge employed by PVB stating, inter alia, that he was concerned about possible "negative" consequences flowing from his appearance at the hearing on petitioner's motion (A30, n.7; 403). There was no indication in either

(Footnote Continued)

rejected petitioner's "direct violation" theory, recognizing but declining the invitation to rule that the effects of a past First Amendment violation must be presumed to continue and therefore any alleged infringement of First Amendment rights constitutes irreparable injury per se (A31-A32). The District Court pointed out that all of the Second Circuit cases relied on by petitioner in support of this theory involved, not dismissals from employment, but the application or enforcement of statutes and rules regulating conduct (A31, A32).

Finally, the Court noted that what it termed a "related consideration," i.e., petitioner's year-long delay in seeking

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(Footnote Continued)
source that petitioner's reinstatement on a temporary basis would relieve the alleged chill, and, as the Court specifically noted, the ALJ did not state that his concern "was in any manner connected to [petitioner's] transfer" (A30, n.7).

injunctive relief, argued against the need for drastic action to remedy an irreparable injury (A32-A35). Since petitioner had failed to make the requisite threshold showing of harm necessary to justify issuance of injunctive relief, the Court denied the motion without assessing petitioner's likelihood of success on his underlying claims (A35-A36).

(4)

Opinion of the Court of Appeals

In its unpublished summary order, reported at 948 F.2d 1278, the United States Court of Appeals for the Second Circuit noted, first, that its review of the district court's refusal to grant interim injunctive relief was limited to a determination of whether there had been an abuse of discretion in the lower court's application of the governing principles (A2-A3). It could find no such abuse here.

With respect to the question of irreparable injury, the Court observed that loss of employment does not fall into that category, citing Sampson v. Murray, 415 U.S. 61, 91-92 (1974) (A4). While recognizing that "interference with First Amendment rights may constitute irreparable harm" (A4), the Court found that principle inapplicable here because (1) petitioner had not altered his speech to retain his position; and (2) he had conceded that respondents had not infringed his First Amendment rights since the transfer (A4). Under such circumstances, the Court concluded that Elrod v. Burns, 427 U.S. 347 (1976), was not controlling, and held, as it had in Savage v. Gorski and American Postal Workers Union v. U.S. Postal Service, supra, that reinstatement with back pay, without injunctive relief, could adequately compensate petitioner (A4).

Nor could the Court find any abuse of discretion in the district court's refusal to consider petitioner's evidence of a chilling effect on the speech of his fellow employees (A4). It pointed out, as it had in both Savage v. Gorski, supra, 850 F.2d at 67-68, and American Postal Workers, supra, 766 F.2d at 722, that, because permanent transfer was the real source of any purported chill, temporarily returning petitioner to his job pending resolution of the case would not abate that effect (A4-A5). The Court then further held that Sampson, supra, disposed of the argument that damage to petitioner's self-esteem flowing from the allegedly menial nature of his current assignments constituted continuing punishment for the prior exercise of his First Amendment rights (A5).

Finally, the Court upheld the district court's consideration of petitioner's long delay in seeking interim relief as a factor

bearing on the existence vel non of irreparable injury (A6). It pointed out that petitioner's exhaustion argument did not require a different conclusion, since the relevant exhaustion statute -- New York City's so-called "Whistleblower Law," Admin. Code § 12-113 (A40-A43) -- does not in any way limit an employee's right to seek judicial review of a personnel decision and, in fact, the instant action was commenced before the investigatory procedures provided for in the Code had been completed (A6).

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Second Circuit properly rejected petitioner's argument that a personnel action allegedly taken in response to a public employee's criticism of his employer's policies or practices constitutes irreparable injury per se, thereby automatically requiring reinstatement to his prior position pending trial of the underlying issues. This

conclusion is not in conflict with this Court's decision in Elrod v. Burns, 427 U.S. 347 (1976), which not only pertained solely to political speech, but limited its discussion of "irreparable injury" to situations in which a First Amendment violation was either threatened or ongoing, in the sense that it had in fact caused an employee to change his political allegiance in order to retain his job.

Nor is it in conflict with Rutan v. Republican Party, 497 U.S. 62, 110 S.Ct. 2729 (1990), which was similarly limited to a discussion of the First Amendment right to freedom of political association. In addition, since Rutan involved a motion to dismiss and does not address the question of irreparable injury, its discussion of the presumed chilling effect of personnel decisions based on patronage is irrelevant where, as here, patronage is not at issue and the complaining party concedes that his transfer from one government position to another did not cause

him to cease criticizing agency policies and procedures.

For the same reasons, there is no conflict between the Second Circuit's determination that interim relief was appropriately denied by the district court and various determinations by other Circuit Courts of Appeal concerning the propriety of such relief where political speech is at issue, or where the context concerns reappointment of a prisoner as an advisor to other inmates.

Finally, what petitioner defines as a standing problem reduces to the question of whether the district court properly declined to consider affidavits concerning the alleged chilling effect on petitioner's fellow employees resulting from his transfer. This determination was based not only on the questionable evidentiary value of the affidavits, but on the conclusion that, even if such chill in fact existed, its source was the threat of permanent transfer; this threat

could not be abated by temporary reinstatement; and there was no indication that the proferred affidavits could establish the contrary.

REASONS FOR DENYING THE WRIT

POINT I

WHERE A PUBLIC EMPLOYEE CLAIMS THAT HE HAS BEEN TRANSFERRED BECAUSE HE CRITICIZED CERTAIN AGENCY POLICIES AND PROCEDURES, BUT WHERE HE ALSO CONCEDES THAT HIS FIRST AMENDMENT RIGHT TO ARTICULATE SUCH CRITICISMS HAS IN NO WAY BEEN INTERFERED WITH BY THE TRANSFER, IT IS NOT AN ABUSE OF DISCRETION TO REFUSE TO REINSTATE THE EMPLOYEE TO HIS FORMER POSITION PENDING TRIAL. UNDER SUCH CIRCUMSTANCES, THERE IS NO "IRREPARABLE INJURY", CAPABLE OF BEING ABATED BY REINSTATEMENT, AND THE DECISION OF THE COURT OF APPEALS TO THAT EFFECT IS FULLY IN ACCORD WITH ALL APPLICABLE AUTHORITIES.

(1)

There is no Conflict With Prior Decisions of this Court.

As this Court has noted, "[t]he traditional standard for granting a

preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (emphasis added). Accord, Brown v. Chote, 411 U.S. 452, 456 (1973).

Petitioner proposes that this Court review the instant case because the Second Circuit did not see fit to apply a standard from which either the "irreparable injury" requirement of Doran v. Salem Inn had been completely eliminated, or to which a proviso had been added stating that the standard applies "except where there is an allegation that a government employee's First Amendment right to comment on the policies and practices of his employer has been violated in the past, in which case the past violation will be considered irreparable injury even though injunctive relief cannot, by definition, prevent it."

In support of this proposition, petitioner posits a conflict between the result reached by the Court of Appeals here and this Court's decisions in Elrod v. Burns, 427 U.S. 347 (1976), and in Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729 (1990).[7] No such conflict exists.

We note, first, that petitioner is forced to adopt this position because he has conceded that the act of transferring him to another position within the agency did not prevent him from articulating his criticisms of PVB, and that he has not been prevented from doing so since. It is this fact which is at the heart of his attempt to read into Elrod and Rutan the theory that irreparable injury

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[7] Rutan, on which petitioner focuses in the instant petition, is not cited at all in his original brief to the Second Circuit, suddenly assuming importance only in petitioner's request for reargument or a rehearing en banc.

may be established by the mere allegation of a past First Amendment violation.

In support of this proposition, petitioner observes that three of the plaintiffs in Elrod had been discharged for refusal to change their political affiliations. He then quotes a passage which not only makes no reference to this category of plaintiffs, but is directly preceded by two sentences in which mention of their status is conspicuously missing. See, Petition at p. 21. The omitted introductory part of the quotation in question reads as follows (Elrod, supra, 427 U.S. at 373):

> At the time a preliminary injunction was sought in the District Court, one of the respondents was only threatened with discharge. In addition, many of the members of the class respondents were seeking to have certified prior to the dismissal of their complaint were threatened with discharge or had agreed to provide support for the Democratic party in order to avoid discharge.

This is directly followed by the language on which petitioner relies (id.) (emphasis added):

> It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.

To support petitioner's theory, the omitted introductory sentences must be disregarded; the "therefore" must be eliminated from the first sentence of the passage on which petitioner relies; and the sentence immediately following must be rewritten to refer not just to rights which "were either threatened or in fact being impaired," but to rights which had been so impaired in the past. That this degree of semantic manipulation was not intended, however, is emphasized by the citation to New York Times Co. v. United States, 403 U.S. 713 (1971), which immediately follows

(and which is also omitted by petitioner). That case concerned not a past violation, but an ongoing situation of prior restraint.[8]

In other words, in holding that Elrod was not relevant because the instant petitioner had not altered his speech to retain his position, the Second Circuit was referring directly to the mention of the respondents in Elrod who had changed their party allegiances in order not to lose their jobs. It is petitioner's statement that "[n]othing in Elrod suggests that the plaintiffs suffered any additional injuries

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[8] The Elrod Court then concludes that the Court of Appeals could properly have found that the district court abused its discretion in refusing interim relief, "[s]ince such injury was both threatened and occurring" at the time the motion was made, id. at 374, not "since such injury was threatened, had occurred, and was occurring." Again, the citation which follows this passage, Bantam Books v. Sullivan, 372 U.S. 58, 67 (1963), refers to a case in which preliminary injunctive relief was issued in response to a threat of future action, not past violation.

cognizable under the First Amendment by, for example, changing their political parties," Petition at p. 23, which is flatly contradicted by the text, since the dismissed plaintiffs to whom petitioner refers are not mentioned in the category of plaintiffs to which the Court's reasoning applies. See, Shondel v. McDermott, 775 F.2d 859, 867 (7th Cir., 1985) (noting that Elrod does not discuss reinstatement).

Secondly, petitioner's insistence that there is a conflict with Rutan v. Republican Party is, if possible, a position even less tenable than his assertion that the Second Circuit's holding conflicts with Elrod. Petitioner correctly notes that Rutan does not comment on the "irreparable injury" standard. Petition at p. 22, n.*. Despite this recognition, he then incorrectly reasons that Rutan's discussion of the presumed chilling effects of patronage dismissals applies (1) in a situation where any such

presumption has been overcome by petitioner's concession that his own First Amendment rights were never chilled; and (2) where the rights involved have nothing to do with an individual's personal choice of political affiliation.

Indeed, both Elrod and Rutan stand for the principle that, except in the case of high-level public employees whose political affiliation may well be a matter of legitimate concern, government personnel decisions can not be made on the basis of an employee's political affiliation. The same proposition has not, however, been extended to a public employee's right to comment on the policies and practices of his or her employer.

To the contrary, a series of decisions by this Court has established that an employee's First Amendment right to speak out on such matters is not absolute. Connick v. Myers, 461 U.S. 138 (1982); Givhan v. Western Line Consolidated School

District, 439 U.S. 410 (1979); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977); Pickering v. Board of Education, 391 U.S. 563 (1968). See also, Rankin v. McPherson, 483 U.S. 378 (1987). More specifically, speech by public employees which touches on matters of public concern is protected only to the extent that the employee's interest, as citizen, in commenting on such matters outweighs the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees. See, Pickering, supra, 391 U.S. at 568, 574; Connick, supra, 461 U.S. at 142.

In other words, whatever preeminence Elrod and Rutan may have given to political speech in the government workplace by holding that patronage is not the least restrictive means for fostering a public employer's legitimate interests, Rutan,

supra, 110 S.Ct. at 2734, the same weight has not been given to speech relating to the policies and practices of a government agency. To the extent that this fact may bear on the question of "irreparable injury," Elrod and Rutan are clearly inapplicable to the case at bar, and the Court of Appeals correctly so held.

(2)

The Decisions of Other Circuit Courts of Appeals on Matters Relating to Political Affiliation or Prison Assignments Do Not Conflict with the Second Circuit's Opinion in the Case at Bar.

In support of the instant petition, petitioner discusses four cases which he maintains came to a result different than that reached by the Court of Appeals herein. Not only is this a function of the fact, noted in the brief submitted by respondents to the Court of Appeals, that the various Circuits have slightly differing standards governing issuance of preliminary injunctions, but three of the four cases involved exercise of

the personal right to freedom of political belief and association. Romero Feliciano v. Torres Gaztambide, 836 F.2d 1 (1st Cir., 1987); Perry v. Local Lodge 2569, 708 F.2d 1258 (7th Cir., 1983); Johnson v. Bergland, 586 F.2d 993 (4th Cir., 1978). They are thus readily distinguishable on that ground. See, discussion in subsection (1), supra. Furthermore, none concerned a situation in which the employee in question conceded that his First Amendment rights had not been chilled.[9]

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[9] In fact, the First Circuit's decision in Romero Feliciano, supra, premises issuance of preliminary injunctive relief specifically on the chilling effect of the plaintiff's termination on the exercise of associational rights, 836 F.2d at 4, a chilling effect which, as discussed above, is not present here. Contrary to petitioner's assertion, the First Circuit has also made clear that, particularly in cases not involving political expression, this is indeed a crucial factor in establishing irreparable injury. See, e.g., McDonough v. Trustees of the University System of New Hampshire, 704 F.2d 780, 784, n.2 (1st Cir., 1983); Maceira v. Pagan,
(Footnote Continued)

The fourth case on which petitioner relies, Newsom v. Norris, 888 F.2d 371 (6th Cir., 1989), involved not personnel actions allegedly undertaken in response to an employee's criticisms of agency policies or practices, but failure to reappoint prisoners to advisory positions because of their complaints about the conduct of the chairman of a disciplinary board. These facts alone would distinguish Newsom from the case at bar, but it is also significant that, in Newsom, there were extensive evidentiary findings establishing the fact of retaliation.

That is not the situation here, and this completely undercuts petitioner's thesis. His position appears to reduce to the idea that, prior to a full trial on the merits of a claim of retaliation for the exercise of an

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(Footnote Continued)
649 F.2d 8, 18 (1st Cir., 1981). There is thus patently no conflict between the First and Second Circuits.

individual's First Amendment right to criticize the policies of his public employer, the allegation of a constitutional violation is sufficient to require immediate reinstatement. We respectfully submit that the Sixth Circuit, in the context of a prison case, did not reach this conclusion, and its dicta concerning infringements of First Amendment rights do not establish a conflict with the decision of the Second Circuit in the case at bar sufficient to merit review by this Court.[10]

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[10] Respondents have not been able to locate any other case, even within the Sixth Circuit itself, which has used Newsom to support an argument similar to petitioner's. As of this writing, the case has only been cited three times, in support of unrelated propositions.

POINT II

THE COURT OF APPEALS PROPERLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN NOT CONSIDERING AFFIDAVITS, OF QUESTIONABLE EVIDENTIARY VALUE, ALLEGEDLY ESTABLISHING THAT PETITIONER'S TRANSFER HAD CHILLED HIS FELLOW EMPLOYEES IN THE EXERCISE OF THEIR FIRST AMENDMENT RIGHTS.

Petitioner claims that an erroneous ruling with respect to his standing to assert the alleged chilling effect of his transfer on his fellow employees motivated the district court to refuse to consider the anonymous affidavits which he produced to support this alleged "chill." Standing is a non-issue.

The district court refused to consider this material (1) because of its questionable evidentiary value; and (2) because, as discussed in American Postal Workers and Savage v. Gorski, supra, even if this "chill" existed, there was no evidence that it would be remedied by petitioner's temporary reinstatement to his former position. Since

petitioner does not even challenge the logic of this reasoning, much less demonstrate that it conflicts with prior decisions of this Court or of the other Circuit Courts of Appeal, there are no grounds supporting any need for review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

May 20, 1992

Respectfully submitted,

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